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IN THE

Supreme Court of the United States

October Term, 1968

No. 448

GEORGE LARIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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INDEX.

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes and Rules Involved	2
Statement of the Case	3
Reasons for Granting Certiorari	5
Conclusion	8
Appendix:	
(A) District Court Order of May 16, 1967	9
(B) Court of Appeals Opinion of June 26, 1968	10
(C) Court of Appeals Judgment of June 26, 1968	12
(D) Court of Appeals Order of July 29, 1968, Denying Petition for Rehearing	14

CITATIONS.

Cases:

Bozza v. United States, 330 U. S. 160 (1947)	6, 7
People v. Braune, 363 Ill. 551, 2 N. E. 2d 839 (1936)	5
United States v. Romano, 382 U. S. 136 (1965)	6, 7
United States v. Valdes and Vega, 262 F. Supp. 474 (D. C. Puerto Rico, 1967)	5

Statutes and Rules:

18 U. S. C. 2314	2
Rule 14, Rules of Criminal Procedure	2, 6

Miscellaneous:

Tentative Draft of the American Bar Association on Standards relating to Joinder and Severance (1967), p. 41	5

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

George Laris, by his attorneys, petitions for a writ of certiorari to review a judgment of the Court of Appeals for the Third Circuit filed on June 26, 1968, affirming the District Court's denial of petitioner's motion for a new trial and for judgment of acquittal.

Opinions Below

The District Court rendered no opinion. Its order of May 16, 1967, filed on May 17, 1967, is set forth in Appendix A. The Court of Appeals filed a *per curiam* opinion which is set forth as Appendix B. Its judgment of June 26, 1968, is set forth as Appendix C and its order of July 29, 1968, denying rehearing is set forth as Appendix D.

Jurisdiction

The judgment of the Court below (Appendix C) was entered on June 26, 1968, and the denial of rehearing (Appendix D) was filed on July 29, 1968. The jurisdiction of this Court is conferred by 28 U. S. C. 1254(1).

Questions Presented

1. Whether it was error and a denial of a fair trial to refuse petitioner a severance where he was joined with a co-defendant whose conflicting and antagonistic defense sought to place responsibility for the crime charged upon petitioner.

2. Whether presence at the scene of a contemplated transfer of stolen S & H Green Stamps transported in interstate commerce was sufficient to establish constructive possession and inferences that defendant knew that the stamps were stolen, as well as transported in interstate commerce.

3. Whether judgment of acquittal should have been directed in favor of petitioner.

Statutes and Rules Involved

18 U. S. C. 2314 provides in part:

> "Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000.00 or more, knowing the same to have been stolen, converted or taken by fraud * * * shall be fined not more than $10,000.00 or imprisoned not more than ten years, or both. * * *"

Rule 14 of the Rules of Criminal Procedure provides:

> "*Relief from Prejudicial Joinder.* If it appears that a defendant or the Government is prejudiced by a

joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. * * *"

Statement of the Case

Petitioner was indicted together with Victor Battista, Ralph Hobbs, Gaetano Alexander Miceli and Joseph B. Morris and charged with transportation in interstate commerce from New Jersey to Pennsylvania of approximately ninety million stolen S & H Green Stamps valued in excess of $5,000.00, knowing the same to have been stolen.

Prior to the trial herein, in March of 1967, Battista and Miceli pleaded guilty and a verdict of acquittal was directed for Morris (Tr. 540). Petitioner, Laris, was tried jointly only with Ralph Hobbs. Motions for severance made at the pretrial stage and during the trial (Tr. 11, 12, 299) were denied.

Ninety million S & H Green Stamps were stolen from the S & H Company in Chicago in March, 1966. Eighty million of these stolen stamps (Tr. 139) were transported by a U-Haul truck driven by Battista and Miceli from the Newark airport to the Dick Hunt Ford Agency in Ambrige, Pennsylvania. Hobbs became a passenger in the truck in Pennsylvania (Tr. 55) and directed its occupants to the garage of the Dick Hunt Ford Agency (Tr. 363). Petitioner managed the Laris Motor Sales, Inc., whose stock is owned by his daughters (Tr. 503). This corporation is the lessor of the Dick Hunt Ford Agency (Tr. 472-3).

Arrangements were made through Joseph B. Morris of Los Angeles to sell eighty-five million of the S & H Stamps to Carl Rosenthal of Beverly Hills, California, for

$120,000.00. Rosenthal, a private detective hired by S & H Company, posed as a prospective purchaser (Tr. 121-122) representing a large chain of stores (Tr. 151). Morris and Rosenthal came to Pittsburgh where they met with Hobbs, petitioner, and Federal Bureau of Investigation Special Agent Curtis, posing as a truck driver for Rosenthal (Tr. 124).

Petitioner secured permission of the Dick Hunt Ford Agency to allow the transfer of the stamps at that location (Tr. 101, 455). The U-Haul truck driven by Battista and Miceli and another truck driven by Curtis were parked in the garage of the Ford Agency. Petitioner, Hobbs, Morris and Rosenthal were present in the garage (Tr. 141-144, 203). Rosenthal, Curtis and Battista entered the U-Haul truck and examined the stamps and then the Federal Bureau of Investigation broke into the agency and arrested those present (Tr. 143-144).

Hobbs and petitioner testified in their own defense. As noted in the Court's charge, their testimony "in some particularly important essentials are greatly different" (Tr. 605). Hobbs testified that he did not know that there were S & H Green Stamps in the truck. He disclaimed any knowledge about the transaction until he was brought into it by petitioner, Laris, on May 12, 1966 (Tr. 341-366). In direct conflict, petitioner testified that Hobbs initiated the proposed sale (Tr. 407-9, 531, 539), stating that a company in Pittsburgh in financial difficulty desired to dispose of them. Petitioner contacted Morris who in turn interested Rosenthal in the sale. Petitioner expected to share a 10% commission with Morris (Tr. 536). He asserted that he did not know the stamps were stolen (Tr. 536). Statements by petitioner to the Federal Bureau of Investigation on May 12, 1966, and on July 12, 1966 (Tr. 496, 497, 531)

incriminated Hobbs. Cross examination of petitioner by the attorney for Hobbs was extensive and productive of discrepancies (Tr. 500-530). Witnesses produced by Hobbs contradicted petitioner (Tr. 560, 567). The defenses of Hobbs and petitioner were not merely hostile but were clearly antagonistic.

The jury returned a verdict of not guilty for Hobbs and one of guilty for petitioner (Tr. 619). A motion for a new trial and judgment of acquittal was denied by the District Court and the Court of Appeals for the Third Circuit affirmed.

Reasons for Granting Certiorari

1. Petitioner's trial, together with Hobbs, whose defense was antagonistic, deprived him of a fair trial. The judiciary and the bar have been increasingly concerned with the problem of joinder and severance in criminal trials. The Tentative Draft of the American Bar Association on Standards Relating to Joinder and Severance (1967), p. 41, states:

> "* * * it has long been the view that defendants joined for trial should be granted a severance whenever their defenses are antagonistic to each other. Annot. 70 ALR 1171, 1184-85 (1931). What is to be avoided is the kind of trial fitting the description by one appellate court of the proceeding below: 'The Trial was in many respects more of a contest between the defendants than between the people and the defendants. It produced a spectacle where the people frequently stood by and witnessed a combat in which the defendants attempted to destroy each other.' *People v. Braune*, 363 Ill. 551, 557, 2 N. E. 2d 839, 842 (1936)."

In a similar vein, *United States v. Valdes and Vega*, 262 F. Supp. 474 (D. C. Puerto Rico, 1967), directed a sever-

ance under Rule 14 of the Rules of Criminal Procedure, observing:

> "As counsel for defendant, Luis Valdes, pointedly remarks, Valdes, if compelled to go to trial together with defendant Vega, would have to prepare his defense against two adversaries, the United States and codefendant Vega. They would be united in their effort to convict Valdes. We must agree that under these conditions a joint trial would be the equivalent of a denial of a fair and impartial trial. Hence, separate trials must be provided for these two defendants * * *."

The petitioner had as an adversary not only the Government but Hobbs, his co-defendant, as well. Cross examination by the attorney for Hobbs was extensive and productive in discrepancies (Tr. 500-530). Witnesses were produced by Hobbs to contradict petitioner (Tr. 560, 567). Hobbs and petitioner each blamed one another as the initiator of the sale of stolen stamps (Tr. 341-366, 496, 497, 531). Each asserted his own innocence. Each attempted to destroy the other. Although the grant of a severance is discretionary under Rule 14, its denial here was the denial of a fair and impartial trial. The importance of settling the issue raised herein as to whether petitioner received a fair trial and whether a severance should have been granted under Rule 14 of the Rules of Criminal Procedure warrants the grant of certiorari.

2. Petitioner's guilt was determined herein by pyramiding inferences contrary to *United States v. Romano*, 382 U. S. 136 (1965), and *Bozza v. United States*, 330 U. S. 160 (1947). From presence at the scene of the proposed transfer the jury had to infer that petitioner had constructive possession of the recently stolen stamps and upon that inference there was pyramided under the District Court's instruction the presumption that he knew they were stolen

and that he had caused them to be transported in interstate commerce (Tr. 593-5).

As in *United States v. Romano, supra,* petitioner's presence at the scene of the proposed transfer of stamps:

> "• • • tells us only that the defendant was there and very likely played a part in the illicit scheme. But presence tells us nothing about what the defendant's specific function was and carries no legitimate, rational or reasonable inference that he was engaged in one of the specialized functions connected with possession, rather than in one of the supply, delivery, or operational activities having nothing to do with possession." 382 U. S. at 141.

Actual possession of the stamps was exercised by Battista and Miceli who drove the truck which contained the stolen articles. At no time did petitioner board this truck. Neither Battista nor Miceli testified as witnesses in the trial herein. Their relationship, prior acquaintanceship, or association with petitioner was never established. When the truck was driven into the Dick Hunt Agency to effectuate a transfer, it was boarded by Battista, private detective Rosenthal and Federal Bureau of Investigation Agent Curtis (Tr. 143-144). They opened the cartons of stamps and counted them. They exercised possession and control. At no time did petitioner have possession or control of the stamps. Under these circumstances, to conclude that he had constructive possession of the stamps and to build inferences thereon, that he had knowledge that they were stolen and transported in interstate commerce are inferences which are unjustified. The denial of petitioner's motion for a judgment of acquittal was contrary to *United States v. Romano, supra,* and *Bozza v. United States, supra.*

CONCLUSION

Certiorari should be granted and the judgment below should be reviewed.

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Appendix A

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,

VS.

GEORGE LARIS.

Criminal Action No. 66-183.

ORDER.

AND Now, this 16th day of May, 1967, after considering the briefs and arguments of counsel thereon, the motion of defendant for a new trial is DENIED.

/s/ GERALD J. WEBER,

GERALD J. WEBER,
United States District Judge.

cc: Gustave Diamond, United States Attorney,
633 U. S. Post Office and Courthouse,
Pittsburgh, Pa. 15219.

Charles N. Caputo, Esq.,
197 Carlton House,
Pittsburgh, Pa. 15219.

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 16880

UNITED STATES OF AMERICA,

v.

VICTOR BATTISTA, RALPH C. HOBBS, GEORGE LARIS, GAETANO ALEXANDER MICELI, JOSEPH B. MORRIS,

GEORGE LARIS,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

Argued June 4, 1968
Before HASTIE, *Chief Judge*, and STALEY and SEITZ, *Circuit Judges*.

OPINION OF THE COURT.

(Filed June 26, 1968.)

PER CURIAM.

This is an appeal from an order of the district court denying the motion of George Laris, defendant-appellant, for a new trial. Laris was convicted under 18 U.S.C. § 2314,

for knowingly transporting in interstate commerce stolen S & H Green Stamps of a value in excess of $5,000. Upon this appeal, Laris contends, *inter alia*, that he was denied the right of choice of counsel, that the arrest and search were illegal, and that the district court erred in refusing to postpone his trial because of his alleged ill health.

We have carefully considered all of defendant's contentions and we have independently examined the entire record. We can find no error.

Accordingly, the order of the district court will be affirmed.

A True Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Third Circuit.

Appendix C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 16880

UNITED STATES OF AMERICA,

vs.

VICTOR BATTISTA, RALPH C. HOBBS, GEORGE LARIS, GAETANO ALEXANDER MICELLI; JOSEPH B. MORRIS,

GEORGE LARIS,

Appellant.

(D. C. Criminal No. 66-183)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Present: HASTE, *Chief Judge,* and STALEY and SEITZ, *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court, filed May 17, 1967, be, and the same is hereby affirmed.

ATTEST:

THOMAS F. QUINN,
Clerk.

June 26, 1968.

Appendix D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 16,880

UNITED STATES OF AMERICA,

v.

VICTOR BATTISTA, *et al.*, GEORGE LARIS,
Appellant.

SUR PETITION FOR REHEARING

Present: HASTIE, *Chief Judge,* KALODNER, STALEY, FREEDMAN, SEITZ, VAN DUSEN, *Circuit Judges.*

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court *in banc,* the petition for rehearing is denied.

BY THE COURT,

/s/ STALEY,
Judge.

Dated: July 29, 1968.

[redacted]

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 448

GEORGE LARIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was found guilty by a jury in the United States District Court for the Western District of Pennsylvania of transporting stolen property in interstate commerce in violation of 18 U.S.C. 2314. A motion for a new trial—based on the same grounds presented in his petition for a writ of certiorari—was denied on May 16, 1967. On June 26, 1968, the court below affirmed the order denying the motion for a new trial (Pet. App. B), and, on July 29, 1968, de-

nied a petition for rehearing (Pet. App. D). As of the present time, no judgment has been entered on the conviction, and no sentence has been imposed.[1]

In our view, the order of the district court denying the motion for a new trial was non-appealable under the provisions of 28 U.S.C. 1291. That motion raised issues which are not independent of the judgment, and which might be properly considered upon a direct appeal from the judgment of conviction when entered.[2] See, *e.g.*, *Wheeler* v. *United States*, 159 U.S. 523, 524; *Moore* v. *United States*, 150 U.S. 57, 61-62; *United States* v. *Bertone*, 249 F.2d 156, 161 (C.A. 3). In these circumstances, it would appear that this Court is without jurisdiction to grant further review. See, *e.g.*, *Good Shot* v. *United States*, 179 U.S. 87, 88. There is thus no occasion for us to respond on the merits. Of course, once a judgment is entered by the district court (see note 1, *supra*), petitioner can then

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[1] It is our understanding that petitioner has been and is presently residing, at liberty, in Florida, and has been in ill health. The United States Attorney has informed us that the district judge has indicated to him that he intends to sentence petitioner in the near future.

[2] Although the government did not assert below that the court of appeals lacked jurisdiction, this matter has now come to our attention and, in our view, it is incumbent upon us so to advise this Court. While the court of appeals might possibly have been misled, its *per curiam* opinion noted that the appeal was "from an order of the district court denying the motion of [petitioner] for a new trial" (Pet. App. 10). And, though the court below indicated that it had "carefully considered all of [petitioner's] contentions," it simply affirmed the district court's *order*, there being no judgment to uphold (Pet. App. 11).

appeal his conviction to the court of appeals, should he choose to do so.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

SEPTEMBER 1968.

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